Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-368

THE LAW FIRM OF CALIG AND WATERMAN; JOSEPH WATERMAN AND SAMUEL L. CALIG,

Petitioners,

vs.

SUPREME COURT OF OHIO; OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO; WILLIAM J. BROWN, ATTORNEY GENERAL OF OHIO; BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO; OHIO STATE BAR ASSOCIATION; COLUMBUS BAR ASSOCIATION AND THE STATE OF OHIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the proceeding on June 8, 1979.

OPINIONS BELOW

The judgment of the Supreme Court of Ohio in the original action for declaratory relief has not yet been reported; however, the judgment entry appears in Appendix A to this Petition.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 8, 1979. This Petition has been filed within 90 days of that date. This Court has jurisdiction by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, consistent with the First and Fourteenth Amendments to the United States Constitution as construed by this Court, a state can prevent a lawyer or a law firm from using lawfully existing billboards for the purpose of disseminating truthful advertising about the availability, nature and prices of legal services?

2. Whether, consistent with the First and Fourteenth Amendments to the United States Constitution as construed by this Court, a state can restrict the dissemination of truthful information concerning the availability and terms of legal services where neither a substantial relationship to an important state interest nor even a rational basis has been asserted or is apparent to justify such restriction?

3. Whether a state supreme court denies procedural due process to litigants when it claims original and exclusive jurisdiction over a case raising a substantial federal constitutional issue and then dismisses such constitutional claim without a hearing on either fact or law and without an opinion?

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

United States Constitution, Fourteenth Amendment, § 1

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Code of Professional Responsibility, Disciplinary Rule 2-101(B):

> "In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and surburban directories, law directories and law lists. . . ."

STATEMENT OF THE CASE

Petitioners brought an original action for a declaratory judgment in the Ohio Supreme Court that Ohio Disciplinary Rule 2-101 is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.[1] That rule prohibits lawyers from advertising on billboards irrespective of the form and content of the advertisement and irrespective of the fact that the billboard is already in lawful existence and available for all other forms of lawful expression.

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[1] The Ohio Supreme Court is authorized to issue declaratory judgments. Ohio Rev. Code, Chapter 2721.

The complaint alleged, *inter alia,* that "the plaintiffs are now engaged in the practice of law at Columbus, Ohio, and [that] they provide legal services at modest fees to persons of middle income who do not qualify for governmental legal aid." (Amended complaint, item 4.)

It further alleged that "plaintiffs plan to make substantial use of said billboard media in a manner consistent with good taste in maintaining the highest standards and dignity of the legal profession and meticulously complying with the remaining Supreme Court Guidelines, just as soon as plaintiffs' right to do so is established."[2] (Amended complaint, item 7.)

Plaintiffs also alleged that many persons in need of legal services of the types offered by plaintiffs "do not regularly read newspapers or watch television and, therefore, are not reachable through the other forms of media in which lawyer advertising is permitted by the Disciplinary Rules." (Amended complaint, item 7.)

Ohio Disciplinary Rule [for lawyers] 2-101 permits advertising by lawyers and sets forth strict guidelines to insure that such advertising is not "false, fraudulent, misleading, deceptive, self-laudatory or unfair." (DR2-101 (A), *et seq.*)

The rule, however, goes on to absolutely bar billboard advertising even though such advertising in form and content complies with all of the rules designed to guarantee honesty and fairness and would be permissible in other media including radio, television, newspapers and magazines. (DR2-101(B).)

The only state interest that has been offered to justify this absolute proscription on the use of billboards for

[2] None of the defendants challenged petitioners' standing tc sue. Petitioners' *bona fides* is confirmed by the fact that petitioners' currently use radio, television and newspapers to advertise their legal services.

lawyer advertising is the subjective opinion that billboard advertising, irrespective of context and content, is *per se* "beneath the dignity of the bar." (Ohio Attorney General's Memorandum in the Ohio Supreme Court.) Petitioners contended that this subjective and debateable judgment was insufficient to justify impingement on speech protected by the First and Fourteenth Amendments to the United States Constitution. See *Bates v. State Bar of Arizona,* 443 U.S. 350 (1977) and other cases cited *infra* this petition.

The Ohio Attorney General moved to dismiss the complaint for failure to state a claim for which relief could be granted. The Attorney General argued in effect that the rule is valid as a matter of law. The petitioners filed memoranda in opposition to such motion and suggested the need for an evidentiary hearing. On June 8, 1979, the Ohio Supreme Court dismissed the complaint herein without a hearing on either fact or law and without an opinion. The petitioners had brought this suit as an original action in the Ohio Supreme Court because that court claims "exclusive and absolute" jurisdiction over matters concerning the governance of the Bar in Ohio, see *infra.* Hence, petitioners have never had a hearing anywhere on the Federal constitutional claim asserted herein.

REASONS FOR GRANTING THE WRIT

1. THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION NOT YET RESOLVED BY THIS COURT; NAMELY, WHAT STANDARD OF REVIEW IS APPLICABLE IN DETERMINING THE VALIDITY OF A STATE REGULATION OF COMMERCIAL SPEECH.

Commercial speech is now clearly protected by the First and Fourteenth Amendments to the United States

Constitution, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Lindmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977).

Political speech can be regulated only for reasons of the most compelling nature. *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Kusper v. Pontikes*, 414 U.S. 51 at 58 (1973). No "compelling state interest" is served by prohibiting lawyer advertising on billboards, lawfully existing and available for all other forms of speech, where the same advertising is permitted by the state rule on radio, television and in media such as newspapers and magazines.

Commercial speech does not enjoy the exact same degree of protection as political speech. *Ohralik v. Ohio State Bar Assn., supra*, 436 U.S. at 455-456. However, since commercial speech is protected, any regulation of it must have something more to support it than merely a rational basis. *Lindmark Associates, Inc. v. Willingboro, supra*, 431 U.S. at 96-97. The asserted basis of the regulation here in question, that billboards are inherently "beneath the dignity of the bar," scarcely rises even to the level of a rational basis. Certainly, judged by any more exacting level of scrutiny than "rational basis" the regulations must fail. This case provides the Court with a vehicle to articulate the appropriate standard of review in commercial speech cases.

2. THE QUESTION PRESENTED BY THIS PETITION HAS BEEN DECIDED BY THE SUPREME COURT OF THE STATE OF OHIO IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

Lindmark Associates, Inc. v. Willingboro, supra, is a case quite analogous to this case. There the subject was a ban on "for sale" signs in front of houses. Some of the

same arguments that were made unsuccessfully in support of that ordinance were used to justify this rule in the court below.

In both cases, it was argued that since there were alternative channels of communication these were valid "time, place and manner" regulations. In *Lindmark*, this court responded:

> "That the proscription applies only to one mode of communication, therefore, does not transform this into a time, place and manner case." 431 U.S. at 94.

The court noted there that the ordinance was not concerned with lawn signs *per se* but only with certain messages placed upon lawn signs. Here the rule is not concerned with billboards *per se* – it does not prevent anyone from placing a billboard anywhere he wants – it is rather concerned with keeping certain messages, namely lawyer advertising, off of billboards. This court has held that true time, place and manner regulations are those that can be ". . . justified without reference to the context of the regulated speech. . . ." *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 at 771 (1976).[a]

In *Lindmark*, the state interest in preventing "white flight" was significant but the court was not convinced the ordinance was necessary to achieve it. Here preserving the dignity of the bar is an important state interest but it is by no means clear that this rule bears a substantial relationship to that interest. In fact, the concept behind

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[a] The Ohio Attorney General below suggested that these time-tested rules had been changed by the decision in *Young v. American Mini-Theatres*, 427 U.S. 50 (1976). This is hardly likely since *Virginia Pharmacy Board* was decided the same year as *Young*. Furthermore, *Lindmark Associates* was decided later than *Young*. Finally, the portion of the *Young* opinion upon which the Attorney General relied below, Part III, was only supported by four justices. See the concurring opinion of Justice Powell, 427 U.S. at 73.

this rule seems to be the same one this court rejected in *Bates*.

> "[The] postulated connection between advertising and the erosion of true professionalism is severely strained. At core, the argument presumes that attorneys must conceal from themselves and from their clients the real life fact that lawyers earn their livelihood at the bar." 433 U.S. at 368.

The court below neither took evidence nor rendered an opinion on this challenge.[4] This court should grant the writ at least for the purpose of determining if the Ohio Supreme Court is following this court's precedents.

3. DUE PROCESS REQUIRES THAT SUBSTANTIAL CONSTITUTIONAL CHALLENGES TO STATE LAW BE COGNIZABLE IN SOME COURT OR BEFORE SOME TRIBUNAL CAPABLE OF AFFORDING A HEARING.

The Ohio Supreme Court claims "exclusive and absolute" authority over matters relating to the governance of the bar. *Smith v. Kates*, 46 Ohio St. 2d 263 at 266 (1976). Therefore, this action had to be commenced in that court. The Federal and state constitutional claims were substantial (see reasons 1 and 2) and the petitioners made certain factual allegations proof of which would support this claim. Nevertheless, the Ohio Supreme Court without hearing any evidence or oral argument on the law, dismissed the action *without opinion*.

Petitioners contend that a state court cannot abrogate to itself exclusive jurisdiction over substantial constitu-

[4] It should be noted that noble causes such as the Heart Fund and the American Cancer Society and candidates for office, including judicial office, advertise on billboards with no apparent damage to their dignity.

tional claims, and then dismiss such claims without a hearing or opinion.

It is axiomatic that procedural due process requires that before one be deprived of a fundamental right or interest by a state one be offered a hearing. See e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); cf. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 at 84 (1936) (Brandeis, Jr., concurring).

The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. Petitioners submit that the summary dismissal of a complaint without stated reasons and without either an evidentiary hearing or oral argument, is not a "hearing."

In the context of an administrative hearing, the court made the following comment:

> "The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a "full hearing" – a fair and open hearing – requires more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1 at 18.

See also *Willner v. Committee on Character*, 373 U.S. 96 (1962).

This court should at least issue a writ for the limited purpose of or instructing the Ohio Supreme Court to hold a hearing or explain its reasons for dismissal.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1979

APPENDIX A

THE STATE OF OHIO, CITY OF COLUMBUS	1979 Term To wit: June 8, 1979
Calig and Waterman et al., *Relators,*	No. 79-394 ACTION FOR DECLARATORY RELIEF
vs.	
Supreme Court of Ohio et al., *Respondents.*	

This cause originated in this court on the filing of a complaint for declaratory relief and was considered in the manner prescribed by law. On consideration thereof, it is ordered by the court that this cause be dismissed, sua sponte.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ..... Page .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 8th day of June, 1979.

THOMAS L. STARTZMAN, Clerk
By /s/ SAM F. ADKINS, Deputy